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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 04-40043-01**
	)	
MARY TIFFANY MARTIN,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM ORDER DENYING MOTION TO SUPPRESS

This matter comes before the Court on defendant Mary Tiffany Martin's Motion to Suppress (Doc. 17) all evidence seized from the search of the rental car she was driving on March 16, 2004. On Friday August 6, 2004, the Court held a hearing on defendant's motion to suppress, and allowed the parties seven days to provide further briefing. Having reviewed the evidence and arguments presented by the parties, the Court is now prepared to rule.

Facts

On March 16, 2004, Kansas Highway Patrol Trooper Jason Edie stopped a Plymouth PT Cruiser with Georgia license plates on Interstate 70 in Wabaunsee County, Kansas for following a Ford Expedition too closely. After being stopped, the driver of the PT Cruiser told Edie that he was traveling with the Expedition. Edie requested permission to search the PT Cruiser, which the driver refused; so Edie called Trooper Morris and his drug detection dog, Targo, to the scene. Targo indicated on the odor of drugs, and the Troopers searched the car, seizing $49,000 in a suitcase found inside the car.

At about 9:15 a.m., Edie radioed Trooper Rios and told him to be on the lookout for a

Silver Ford Expedition with North Carolina license plates which appeared to be traveling with the vehicle he had just stopped and seemed suspicious. It is unclear from Rios' testimony exactly what information Edie relayed about the Expedition and his stop and search of the PT Cruiser in this initial call. Rios testified at one point that Edie had said that: he had stopped a PT Cruiser whose driver had admitted to traveling with the Expedition; the PT Cruiser contained a large amount of cash; and that the Expedition was being driven by a white female. However, later in his testimony, Rios testified that he did not remember whether Edie told him that a white female was driving the Expedition, and that Edie did not tell him that the troopers had found anything illegal in the PT Cruiser at that time. Rios finally testified that he could only be certain that Edie told him to be on the lookout for a silver Expedition with North Carolina license plates.

Approximately five minutes after receiving the initial call from Edie, Rios observed a silver Ford Expedition bearing North Carolina license plates, which was being driven by defendant. The Expedition was leaving a gas station and pulled onto Interstate 70 going westbound. Rios followed the Expedition to attempt to identify the vehicle. As the Expedition was in the right lane, Rios pulled into the left lane within a car length of the vehicle and saw defendant. Rios testified that he followed defendant looking for a reason to stop her and that he did not believe he had cause to stop her based only upon the information he learned from Edie.

After following defendant for approximately thirteen miles, Rios noticed that defendant was following a tractor trailer too closely. Rios testified that defendant was traveling sixty-five to seventy miles per hour, but was not speeding. Defendant then moved into the left lane in front of Rios and proceeded to pass the trailer. Rios testified that defendant improperly passed the trailer because she passed the vehicle with insufficient clearance, which he defined as two

vehicle lengths or less. Rios could not see whether the trailer had to brake or take any other evasive action as a result of defendant pulling in front of it, but he stated that, based upon his experience, he thought defendant pulled within the trailer's blind spot. It was overcast, hazy, with no precipitation at the time Rios saw defendant commit these traffic violations. Road terrain on this stretch of Interstate 70 was flat, and traffic was "a little heavy" as defendant was in the Junction City metro area.

Rios testified that he surmised that defendant was following too closely, based on his application of the "two second rule." Pursuant to the rule, Rios notes a landmark and counts two seconds between the passage of the first vehicle and the second vehicle. Rios testified that if less than two seconds elapses between the vehicles, the second vehicle is following too closely. Rios stated that regardless of the traffic patterns, speed and road conditions, less than two seconds between vehicles is always unreasonable. He testified that even if a vehicle was boxed in on all sides by traffic, he would still have reasonable suspicion to stop the boxed-in vehicle for following too closely because it is a "moment decision" that must be made by the troopers for the safety of drivers. Rios also stated that at times he was within two seconds of defendant's vehicle, but that he did not commit a traffic offense as he was in a different lane.

At approximately 9:30 a.m., after observing defendant both follow the trailer too closely and improperly pass it, Rios activated the lights of his patrol car and pulled defendant over. He approached the vehicle on the left side, told defendant why he had stopped her and asked her about her travel plans. She told him she was traveling from North Carolina to Denver to visit friends, and possibly to move to Denver, but she could not say how long she planned to stay in Denver. She also told Rios that she had rented the Expedition. Rios then requested defendant's

drivers license and proof of insurance. Defendant provided Rios with her license and a vehicle rental agreement. The license identified the driver as Mary T. Martin and was valid. Rios took the documents back to his patrol car to examine the rental agreement and noticed that defendant's name did not appear on the contract. The vehicle was rented to Finn O'Brian. Rios prepared a warning citation, citing defendant for violating two Kansas traffic statutes, K.S.A. § 8-1523, following a vehicle too closely, and K.S.A. § 8-1516, improper passing, but he did not give the citation to defendant at that time because he had not yet verified that defendant was authorized to drive the Expedition.

Rios testified that during his initial contact with defendant, he noticed that defendant was nervous and fumbled to get her driver's license. In Rios' view, defendant was more nervous than what he experiences in a typical traffic stop. When Rios asked defendant about her traffic plans, her nervousness increased further. Inside the Expedition were a large dog and a small dog. Rios considered this unusual as rental vehicles usually do not carry dogs for liability reasons.

Rios then radioed dispatch and asked them to contact Triangle Rent A Car, the rental company, to see if defendant was authorized to drive the car. He also requested Triple I information on defendant. Rios then walked back to defendant and explained that he was waiting to hear from the rental company, and that was the reason for the delay. At this point, Rios stated that defendant was cooperative, but "antsy." She wanted to go and the dogs were getting restless. Defendant was also still nervous, which Rios considered unusual because normally people get more relaxed as a traffic stop progresses.

Rios returned to his patrol car and waited for dispatch to contact him. Dispatch radioed him and stated that the rental company wanted to know if Finn O'Brian was in the car and the

relationship between defendant and O'Brian. At this time, Edie radioed Rios and told him that the drug dog, Targo, had alerted to the scent of a controlled substance in the PT Cruiser. Trooper Morris started toward Rios' location to see if Rios needed assistance.

Rios then approached defendant for the third time and told her that he was still waiting on the rental company. He asked defendant if he could ask her some questions and she said "yes." Rios asked about defendant's travel plans again and if there were any illegal drugs or guns in the car, which defendant denied. During this contact with defendant, her nervousness escalated further. Her voice tone changed and became softer. She told Rios that he did not have a reason to stop her and merely stopped her "because he wanted to." Rios asked for consent to search defendant's vehicle and she refused stating that she needed to get going and was supposed to have dinner with friends in Denver that evening. Rios testified that because he still had the rental contract and was waiting to hear from the rental company, defendant was not free to leave when he requested permission to search her car.

By this time, Trooper Morris had arrived with Targo. Morris testified that Targo was certified and trained as a drug detection dog. Specifically, Morris recounted that he and Targo attended a ten week training course in October 2000 to become certified. This certification has been renewed annually, and since October 2000 Targo has always been certified. Targo also participates in a week long training session bi-annually, and is trained one day every week. Morris testified that Targo has never falsely indicated to the odor of drugs, when the odor of drugs was not present.[1]

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[1]This testimony was based only upon searches conducted as a part of Targo's training, not upon searches conducted in the field, as Morris could only be sure that the odor of drugs was not present in a sterile, controlled environment.

Morris asked defendant to raise her windows before he took Targo around her vehicle because she had two dogs in the car. Morris testified that the presence of the dogs in the car would have no effect on Targo because Targo is trained around distractions and had a distinctive scratching reaction to the scent of drugs. At approximately 10:00 a.m., Morris deployed Targo in a counterclockwise circle starting at the rear center bumper. At that same moment, dispatch advised Rios that the rental car company said defendant was not authorized to drive the vehicle and Rios asked dispatch what the rental company wanted to do with the rental vehicle. Targo then alerted to the odor of narcotics at the rear bumper area and the rear left door, and then indicated at the left rear door by scratching at the door. A couple of minutes after Targo indicated, dispatch advised Rios that the rental company wanted the vehicle impounded.

Morris then asked defendant to get out of her vehicle. He opened the back hatch and in the cargo area of the vehicle under a plastic cover found four large plastic tubs containing green leafy plants that appeared and smelled like marijuana. The lids of the containers contained fluorescent, battery operated lights. Defendant denied both knowledge of the existence of the tubs and of the tubs' contents. Defendant was detained and transported to the Junction City Police Department warehouse. The Expedition was driven by Morris to the warehouse where it was impounded. Pursuant to Kansas Highway Patrol policy, a mandatory full inventory search was conducted on the impounded vehicle. Rios never gave the warning citation, which he had earlier prepared, to defendant, nor did he return defendant's driver's license or the rental papers. At some point, prior to the time the vehicle was impounded, Rios received Triple I information on defendant that she had a previous record of possession of drugs or some drug related offense.

On April 21, 2004, the grand jury returned a two count Indictment charging defendant

with: conspiracy to possess with the intent to distribute a controlled substance; and possession with the intent to distribute a controlled substance.

Analysis

"'A traffic stop is a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief.'"[2] The principles of *Terry v. Ohio*[3] apply to such traffic stops. Thus, the reasonableness of a stop depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[4]

1. The Validity of the Initial Stop

Tenth Circuit cases establish that "a detaining officer must have an objectively reasonable articulable suspicion that a traffic violation has occurred or is occurring before stopping [an] automobile."[5] Reasonable suspicion requires that an officer provide "some minimal level of objective justification."[6] However, an officer with reasonable suspicion need not "rule out the possibility of innocent conduct as long as the totality of the circumstances suffices to form a particularized and objective basis for a traffic stop."[7] Furthermore, reasonable suspicion may be

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[2]*United States v. Holt*, 264 F.3d 1215, 1220 (10th Cir. 2001) (en banc) (quoting *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998) (further quotation omitted)).

[3]392 U.S. 1 (1968).

[4]*Id.* at 19-20.

[5]*United States v. Cervine*, 347 F.3d 865, 869 (10th Cir. 2003); *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993).

[6]*United States v. Vercher*, 358 F.3d 1257, 1261 (10th Cir. 2004).

[7]*Id.*

supported by an "objectively reasonable" good faith belief even if premised on factual error.[8] Rios stopped defendant for following too closely and improper passing, both of which are traffic offenses in Kansas.

a. Following Too Closely - K.S.A. § 8-1523(a)

Defendant argues that Rios stopped her without reasonable suspicion that she had violated a traffic law. K.S.A. § 8-1523(a) states: "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Rios testified that he used the "two-second rule" to determine that defendant was in violation of the statute. He further testified that regardless of the traffic patterns, speed and road conditions, less than two seconds between vehicles is always unreasonable, and that he uses a snapshot, not all relevant factors, to determine whether a violation of K.S.A. § 8-1523(a) has occurred. Indeed, in this case, Rios did not conduct the two-second test more than once, nor could he say whether defendant had violated the two-second rule any other time over the past thirteen miles that he had followed her. The videotape recording the stop did not capture defendant following too closely. Moreover, defendant only violated the two-second rule after coming upon a slower moving tractor trailer, in a congested stretch of Interstate 70 in the Junction City metro area, and she signaled to change lanes after coming behind the trailer. Defendant was traveling sixty-five to seventy miles per hour, but was not speeding and the weather conditions were ideal. For defendant to pass the trailer she had to move into the left lane, but Rios was following defendant in the left lane at this time. The Court wonders whether defendant's alleged traffic infraction was actually caused by

[8] *Id.*

Rios' presence, particularly because Rios admitted that he was in violation of the two-second rule as he tailed defendant.

Nevertheless, under Tenth Circuit law, the Court must conclude that Rios had reasonable suspicion to stop plaintiff for a violation of K.S.A. § 8-1523. In *United States v. Vercher,*[9] which was another traffic stop by Trooper Rios for following too closely, the Tenth Circuit stated that "[o]n a rural interstate in Kansas, an officer's observation of the high speed and dangerously close traveling distance provides sufficient objective justification to suspect that the distance between vehicles is not reasonable and prudent."[10] According to the court, to require the officer "to deliberate for a longer period of time before effectuating a traffic stop circumvents our reasonable suspicion analysis, which is purposely designed to avoid unrealistic second-guessing of police officers' decisions, and to accord appropriate deference to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions."[11] The Tenth Circuit has also approved the use of the "two second rule" to provide the "minimal level of objective justification" required for reasonable suspicion justifying a traffic stop.[12] Thus, as *Vercher* prescribes, the Court concludes that Rios' observation of defendant's vehicle traveling at sixty-five to seventy miles per hour and in close proximity to the trailer, even if a snapshot, provided

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[9]358 F.3d 1257.

[10]*Id.* at 1262.

[11]*Id.*

[12]*United States v. Nichols*, 374 F.3d 959, 965 (10th Cir. 2004). Notably, in *Nichols*, the Trooper used the two second rule but calculated the distance between cars *three* separate times before pulling the defendant over.

reasonable suspicion to stop defendant for violating K.S.A. § 8-1523(a).[13]

b. Improper Passing - K.S.A. § 8-1516(a)

Even assuming, *arguendo*, that Rios lacked reasonable suspicion to stop defendant for following too closely, another independent traffic violation provided reasonable suspicion for the stop. K.S.A. § 8-1516(a) provides that "[t]he driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." Rios testified defendant improperly passed the trailer because she passed the vehicle with insufficient clearance, which he defined as two vehicle lengths or less. Although Rios could not see whether the trailer had to brake or take any other evasive action as a result of defendant pulling in front of it, he thought, based upon his experience, that defendant pulled into the blind spot directly in front of the trailer. The videotape, which was recording the stop, corroborates this testimony; defendant is seen pulling into the left lane, slowly accelerating, and then moving back into the right lane directly in front of the tractor trailer. Based upon his testimony and the videotape, the Court finds that Rios had reasonable suspicion to believe defendant violated K.S.A. § 8-1516.

2. Validity of the Roadside Detention

Defendant argues that the traffic stop, assuming it was legal, should have terminated immediately upon Rios' decision to issue a warning ticket and that Rios' failure to terminate the stop at this point amounts to an involuntary detention. It is settled that even if the initial stop of

[13]In *United States v. Vercher*, 358 F.2d 1257, 1260-61 (10th Cir. 2004), the court noted that traffic conditions might be material to a determination of reasonable suspicion, stating "Were this a case involving commuter traffic on congested roads, rather than the sparsely populated traffic conditions revealed by our review of the videotape, our decision might be otherwise. However, on these facts and this speed--seventy to seventy-five miles per hour--we believe that the district court's conclusion that Rios's observations did not amount to reasonable suspicion was in error."

defendant's vehicle was legitimate, the detention must be "reasonably related in scope to the circumstances which justified the interference in the first place," as required under *Terry*.[14] "Generally, an investigative detention must last no longer than is necessary to effectuate the purpose of the stop."[15] The detention must be temporary and its scope must be carefully and narrowly tailored to its underlying justification.[16] During a traffic stop, a police officer may request a driver's license and a vehicle registration, run a computer check on the car and driver, and issue a citation, but "if the driver produces a valid license and proof of right to operate the vehicle, the officer must allow [her] to continue on [her] way without delay for further questioning."[17]

Here, although defendant produced a valid driver's license, she failed to produce any "proof of right to operate the vehicle." Defendant produced a rental agreement, but the Expedition was rented to Finn O'Brian, not defendant. Rios then called the rental company to verify that defendant was authorized to drive the Expedition, and detained defendant for approximately thirty minutes while waiting for the response. Defendant's failure to provide a rental agreement in her name justified some detention to inquire into her right to operate the

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[14]*United States v. Williams*, 271 F.3d 1262, 1266 (10th Cir. 2001); *United States v. Bustillos-Munoz*, 235 F.3d 505, 512 (10th Cir. 2000).

[15]*Cervine*, 347 F.3d at 870-71 (internal quotation omitted); *United States v. Patten*, 183 F.3d 1190, 1193 (10th Cir. 1999).

[16]*United States v. Guiterrez-Daniez*, 131 F.3d 939, 942 (10th Cir. 1997), *cert. denied* 523 U.S. 1035 (1998); *United States v. Lindsey*, 288 F. Supp. 2d 1196, 1202 (D. Kan. 2003).

[17]*United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993). *See also United States v. Zubia-Melendez*, 263 F.3d 1155, 1161 (10th Cir. 2001)

Expedition.[18] The detention of defendant for thirty minutes to verify that she was authorized to drive the Expedition was justified and therefore in accordance with *Terry*.[19]

3. Drug Dog Sniff & Subsequent Search

Lastly, defendant argues that the drug dog's indication was not sufficient to permit the continued detention and search of the Expedition and asks the Court to suppress the evidence seized on that basis. The government responds that defendant did not have standing to contest the search, the indication from the drug dog provided sufficient probable cause to search the vehicle, and in any event, the evidence would have been inevitably discovered.

a. Standing

Standing to challenge a vehicle search is distinguishable from standing to seek suppression of evidence discovered in a vehicle as the fruit of an unlawful stop or detention.[20] In the latter case, standing exists and the evidence must be suppressed.[21] However, in the case of a vehicle search, a defendant only has standing to challenge a search if she has a reasonable expectation of privacy in the area being searched.[22] Because the Court has determined that the evidence seized from the Expedition was not the fruit of an unlawful stop or detention, defendant

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[18]*See United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) (listing a number of cases where a "defendant's lack of a valid registration, license, bill of sale, or some other indicia of proof to lawfully operate and possess the vehicle . . . [gives] rise to an objectively reasonable suspicion that the vehicle may be stolen"; *United States v. Hunnicut,* 135 F.3d 1345, 1349 (10th Cir. 2001) ("The inability to offer proof of ownership or authorization to operate the vehicle has figured prominently in many of our cases upholding [a lengthened detention for] further questioning.").

[19]*See United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995) (A detention of approximately thirty minutes to verify a driver's license and that a driver is legitimately operating a rental vehicle is justified).

[20]*United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996).

[21]*Id.*

[22]*Id.* at 1499.

must demonstrate that she had a reasonable expectation of privacy in the Expedition to challenge its subsequent search. However, it is settled that "a defendant in sole possession and control of a car rented by a third party has no standing to challenge a search or seizure of the car."[23] Defendant had no legitimate possessory or ownership interest in the Expedition and, as such, lacks standing to challenge the search of the vehicle.

b. Drug Dog Indication

Defendant argues that the indication from the drug dog, Targo, did not provide probable cause to search the Expedition because Targo was not reliable. Probable cause means that "there is a fair probability that contraband or evidence will be found in a particular place."[24] A dog alert is generally at least as reliable as many other sources of probable cause and "is certainly reliable enough to create a fair probability that there is contraband [present]."[25] However, probable cause requires that the alert be made by a trained dog.[26] The Tenth Circuit has explained that:

> With a canine, the reliability should come from the fact that the dog is trained and annually certified to perform a physical skill. When the annual certification process involves actual field testing and grading of the canine's drug-detection skills, the canine's reliability is sufficient for a probable cause determination absent some circumstance that justifies a more complete examination of the canine's skill and performance.[27]

For instance, a dog alert might not give probable cause if the drug dog has a poor accuracy

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[23]*Jones*, 44 F.3d at 871.

[24]*Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

[25]*Unites States v. Ludwig*, 10 F.3d 1523, 1527-28 (10th Cir. 1993).

[26]*United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997).

[27]*Id*. (quoting *United States v. Wood*, 915 F. Supp. 1126, 1136 n.2 (D. Kan. 1996), *rev'd on other grounds*, 106 F.3d 942 (10th Cir. 1997)).

record.[28]

Here, all the evidence indicates that Targo was reliable. Trooper Morris testified and the documents demonstrate that Targo was certified and trained at the time of the stop. Specifically, Morris recounted that he and Targo attended a ten week training course in October 2000 to become certified. This certification has been renewed annually, and since October 2000 Targo has always been certified. Targo also participates in a week long training session biannually, and is trained one day every week. Morris testified that Targo has never falsely indicated to the odor of drugs, when the odor was not present. Defendant suggests that the presence of the other dogs in the vehicle might have caused Targo to give a false indication. Morris testified that Targo is trained to ignore food, environment, activity and other dogs, and is always trained around other dogs. Further, he testified that any reaction to defendant's dogs would be different from Targo's reaction to the scent of drugs, which is an aggressive scratching behavior. Thus, the Court concludes that Targo's indication provided probable cause to search the Expedition.

c. Inevitable Discovery

Even if defendant had standing to challenge the search of the Expedition, and the evidence was unlawfully seized, the evidence would still be admissible because it would have been inevitably discovered. The inevitable discovery exception to the exclusionary rule applies "when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means."[29] "Those lawful means

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[28]*Ludwig*, 10 F.3d at 1528.

[29]*United States v. Tueller,* 349 F.3d 1239, 1243 (10th Cir. 2003).

include an inventory search."[30] It is common practice for the police to conduct an inventory of the contents of vehicles they impound.[31] The Kansas Highway Patrol policy comports with common practice; Rios testified that, pursuant to the policy of the Kansas Highway Patrol, a mandatory full inventory search was conducted on the Expedition after it was impounded. Consequently, the evidence would have been legally discovered by the police and admissible even it had been unlawfully seized.[32]

IT IS THEREFORE ORDERED BY THE COURT that defendant's Motion to Suppress (Doc. 17) is DENIED.

IT IS SO ORDERED.

Dated this 19th day of August 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

[30] *Id.*

[31] *Id.*

[32] *United States v. Haro-Salcedo,* 107 F.3d 773-74 (10th Cir. 1997) "The inevitability of discovering evidence by lawful means removes the taint from evidence first discovered through unlawful means.").